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No. 78-211

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PETITIONER

v.

NEWPORT TANKERS CORPORATION and NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Respondent Newport Tankers Corporation (the Company) owns the S/T *Achilles,* an American Flag vessel. In December 1975, the Company entered into an agency agreement with O.B.O. Ship Operators, Inc. (OBO) under which OBO was to manage the *Achilles.* OBO then entered into a collective bargaining agreement with District 2, Marine Engineers Beneficial Association-Associated Maritime Officers (MEBA), designating MEBA as the exclusive referral source of officers to serve aboard the *Achilles.* This collective bargaining agreement further provided that the *Achilles* have a minimum complement of four deck officers—a master and three mates (Pet. App. 12a-13a, 26a-28a).

Petitioner International Organization of Masters, Mates and Pilots (MMP) is a longtime rival of MEBA's (Pet. App. 4a-6a). MMP supplied the *Achilles* with its deck officers prior to the OBO-MEBA agreement mentioned above and therefore initiated proceedings under AFL-CIO auspices against MEBA for interfering with an established bargaining relationship (Pet. 9). At an AFL-CIO meeting on April 9, 1976 concerning the MEBA-MMP dispute, MEBA indicated that it had no agreement covering the *Achilles*, despite facts to the contrary (Pet. App. 13a n. 6; Tr. 49-50, 57-58, 72-73, 81, 104-107).[1]

On April 13, 1976, the *Achilles*, manned by its four deck officers, docked at a privately-owned berth in Chesapeake, Virginia, and began to land grain. The next day, several members of the Offshore Division of MMP picketed the vessel with signs that read:

> SS [sic] ACHILLES EMPLOYS A SECOND AND THIRD MATE NOT COVERED BY A COLLECTIVE BARGAINING AGREEMENT. THE SECOND AND THIRD MATES ARE EMPLOYED UNDER SUB-STANDARD WORKING CONDITIONS. WE ARE NOT SEEKING THE REPLACEMENT OF ANY PERSONS EMPLOYED ABOARD THE SS [sic] ACHILLES. WE HAVE NO DISPUTE WITH ANY OTHER VESSEL AT THIS FACILITY. OFFSHORE DIVISION OF THE INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS. [Pet. App. 13a, 28a-29a.]

[1]"Tr." refers to the transcript of the hearing before the Board administrative law judge.

Thereupon, employees of the berth owner (who were represented by the International Longshoremen's Association) refused to load the grain while the picketing continued. Two days later, a United States District Court enjoined further picketing by MMP (Pet. App. 29a).

The Board issued a complaint based on MMP's picketing. At the hearing before a Board administrative law judge, MMP took the position that the substandard conditions referred to on the picket signs consisted of the Company's failure to hire an additional mate. While the *Achilles* was operating with three mates—a practice permitted under the MEBA contract—standard MMP contracts required four. Thus, the asserted purpose of the picketing was to have the Company add another mate of its own choosing to the *Achilles*' complement of deck officers (Pet. App. 29a n. 3, 33a). Nevertheless, the administrative law judge held that such picketing was prohibited by Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B) as an attempt to "restrain or coerce * * * an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances" (Pet. App. 33a-35a).

2. A Board majority, reversing the administrative law judge, dismissed the complaint, finding that MMP's picketing did not violate Section 8(b)(1)(B). The Board agreed with the administrative law judge that the mates possessed grievance adjustment authority (Pet. App. 29a-31a).[2] However, the Board concluded that while Section

[2]Chairman Fanning would also have dismissed the complaint on the ground that "the evidence fails to establish that third mates are authorized as collective-bargaining representatives or grievance adjusters on behalf of the Employer" (Pet. App. 17a n.11).

8(b)(1)(B) "protect[s] an employer from a union which might seek to impose its will on the employer by dictating *whom* it should or should not select as its * * * grievance adjuster", the section does not proscribe conduct, such as that of MMP here, which does

> not diminish in any way the Employer's unfettered right to select the representative of its choice. While concededly the Employer might be forced to hire an additional third mate, the choice as to who that third mate shall be is totally within its discretion and control. There is nothing in the record to indicate that MMP sought to have one of its own members selected as the additional third mate. [Pet. App. 16a.]

Member Penello dissented, agreeing with the administrative law judge that the attempt to force the Company to hire an additional mate was prohibited by Section 8(b)(1)(B) because the effort could force an employer

> to increase the number of individuals performing [the mates'] task[s], thus insuring that responsibility for adjustment of grievances would be divided among several people and diluting the authority of the person whom the employer would prefer to handle all his grievances. [Pet. App. 22a.]

Moreover, Member Penello would have found that "the actual object of MMP's picketing was the replacement of the ship's officers with MMP members" (Pet. App. 23a). In this regard, Member Penello relied upon (1) earlier cases in which the Board had found MMP to be engaged in a sustained effort to replace MEBA officers on ocean vessels with MMP members; (2) the inaccurate statement on MMP's picket signs that there was no contract

covering the second and third mates; and (3) the fact that, contrary to MMP's professed concern over substandard manning on the ship, MMP itself had negotiated contracts providing for only four deck officers (a master and three mates), the complement present on the *Achilles* (Pet. App. 23a-24a).[3]

3. The court of appeals vacated the Board's order dismissing the complaint, primarily on the "dilution of authority" theory advanced by Member Penello and the administrative law judge (Pet. App. 6a-7a). In addition, the court stated that even if it had accepted the Board's interpretation, it agreed with Member Penello that MMP's objective was, in fact, the replacement of the *Achilles'* deck officers with its own members (Pet. App. 7a). Thus, the court found two bases for concluding that MMP had violated Section 8(b)(1)(B) and remanded the case to the Board for issuance of an order consistent with its opinion (Pet. App. 8a).

4. The Board believes that the court of appeals erred in failing to accept the Board's view that Section 8(b)(1)(B) does not prohibit union picketing to increase the number, as opposed to affecting the identity, of an employer's representatives for the purpose of collective bargaining or the adjustment of grievances. The Board's construction of Section 8(b)(1)(B) is reasonable, and the court of appeals' rejection of that construction is contrary to the settled principle that even if the Board's construction of a

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[3]The administrative law judge, having found a violation on the "dilution of authority" theory, did not pass on the contention that MMP actually sought to replace MEBA deck officers with its own members. However, the law judge did note "that such an object [was] indicated by" the same factors later cited by Member Penello (Pet. App. 33a-34a n.7).

statutory section is "not the only tenable one," it will be upheld if it "is an acceptable reading of the statutory language and a reasonable implementation of the purposes of the relevant statutory sections." See *National Labor Relations Board* v. *Local No. 103, International Association of Bridge Workers (Higdon Contracting Company)*, 434 U.S. 335, 341.

However, the court of appeals alternatively based its holding that MMP violated Section 8(b)(1)(B) on the ground that MMP intended to force replacement of the deck officers with its own members. Although the Board believes that the court of appeals erroneously assessed MMP's intent in this regard, such a question is essentially an evidentiary dispute which is not appropriate for review by this Court. See *Universal Camera Corporation* v. *National Labor Relations Board*, 340 U.S. 474, 490-491 (1951). Accordingly, the Board did not file a petition for a writ of certiorari in this case. Should MMP's petition for certiorari be granted, the Board will defend its decision and order.

Respectfully submitted.

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